STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals
(Jansen, P.J., Gleicher, C.J., and Ronayne Krause, J.)

LONG LAKE TOWNSHIP, Plaintiff–Appellee, v TODD MAXON and HEATHER MAXON, Defendants–Appellants.	Supreme Court No. 164948 Court of Appeals No. 349230 Grand Traverse CC No. 18-034553-CE

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AND MACKINAC CENTER FOR PUBLIC POLICY

Daniel S. Korobkin (P72842)
Philip Mayor (P81691)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Brett Max Kaufman
Nathan Freed Wessler
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2603
bkaufman@aclu.org

Patrick J. Wright (P54052)
Mackinac Center for Public Policy
140 West Main Street P.O. Box 568
Midland, MI 48640
(986) 631-0900
wright@mackinac.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED vii

STATEMENT OF INTEREST OF AMICI CURIAE vii

INTRODUCTION 2

ARGUMENT 4

I. Repeated and Targeted Low-Altitude Aerial Surveillance of Curtilage Interferes with the Fourth Amendment Right to Be Secure in Our Homes Against Unreasonable Searches. 4

II. Drones Supercharge the Capabilities and Availability of Aerial Surveillance, and Their Investigative Use By Government Actors Requires Courts to Engage in a Fresh Application of Fourth Amendment Protections 6

III. The Township's Repeated and Targeted Low-Altitude Aerial Surveillance of Appellants' Home Without a Warrant Violated the Fourth Amendment 13

IV. This Court Should Apply the Exclusionary Rule in this Context to Deter Municipalities from Violating Michiganders' Fourth Amendment Rights 13

A. The exclusionary rule's deterrence function is especially important where the state deploys increasingly powerful modern surveillance technologies. 14

B. Michigan's Constitution and precedent favor applying the exclusionary rule here 16

C. This Court would be in good company if it applied the exclusionary rule to these civil proceedings 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

ACLU v Clapper,
785 F3d 787 (CA 2, 2015) 1

Alasaad v Nielsen,
419 F Supp 3d 142 (D Mass, 2019) 1

State v Gutierrez,
116 NM 431; 863 P2d 1052 (1993) 19

Bovat v Vermont,
141 S Ct 22 (2020) 5

Boyd v United States,
116 US 616; 6 S Ct 524; 29 L Ed 746 (1886) 4, 11

Brown v Illinois,
422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975) 15

California v Ciraolo,
476 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986) 9, 11

Carpenter v United States,
585 US __; 138 S Ct 2206; 201 L Ed 2d 507 (2018) ..... *passim*

Carson v State ex rel Price,
221 Ga 299; 144 SE2d 384 (1965) 19

Collins v Virginia,
138 S Ct 1663; 201 L Ed 2d 9 (2018) 4

Commonwealth v Mora,
485 Mass 360; 150 NE3d 297, 309 (Mass, 2020) 5, 7

Dow Chemical Co v United States,
476 US 227 (1986) 5, 9, 10

Finn's Liquor Shop, Inc v State Liquor Auth,
24 NY2d 647; 249 NE 2d 440; 301 NYS 2d 584 (1969) 20, 21

Florida v Jardines,
569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013) 4

Florida v. Riley,
488 US 445 (1989) 10, 11

Goosen v Walker,
714 So 2d 1149 (Fla App, 1998) 13

In re Jenkins,
437 Mich 15; 465 NW2d 317 (1991) 14

Jackman v Cebrink-Swartz,
334 So 3d 653 (Fla App, 2021) 12

Johnson v VanderKooi,
502 Mich 751; 918 NW2d 785 (2018) 1

Katz v United States,
389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967) 11

Kivela v Dep't of Treasury,
449 Mich 220; 536 NW2d 498 (1995) 14, 19

Kyllo v United States,
533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001) 6, 9

Leaders of a Beautiful Struggle v Baltimore Police Dep't,
2 F4th 330 (CA 4, 2021) 2, 11

Lebel v Swincicki,
354 Mich 427; 93 NW2d 281 (1958) 17, 18

McNitt v Citco Drilling Co,
397 Mich 384; 245 NW2d 18 (1976) 17

Oliver v United States,
466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984) 4, 5

One 1958 Plymouth Sedan v Pennsylvania,
380 US 693; 85 S Ct 1246; 14 L Ed 2d 170 (1965) 14

Pennsylvania Bd of Prob & Parole v Scott,
524 US 357; 118 S Ct 2014; 141 L Ed 2d 344 (1998) 14

People v Frederick,
500 Mich 228; 895 NW2d 541 (2017) 1, 4

People v Katzman,
505 Mich 1053; 942 NW2d 36 (2020) 17

People v Slaughter,
489 Mich 302; 803 NW2d 171 (2011) 17

People v Stevens,
460 Mich 626; 597 NW2d 53 (1999) 14, 15

People v Tafoya,
494 P3d 613 (Colo, 2021) 4

People v Tanner,
496 Mich 199; 853 NW2d 653 (2014) 16, 17

People v Warner,
401 Mich 186; 258 NW2d 385 (1977) 15, 18

People v Hughes,
506 Mich 512; 958 NW2d 98 (2020) 1

People v Marxhausen,
204 Mich 559; 171 NW 557 (1919) 16

People v Brown,
279 Mich App 116; 755 NW2d 664 (2008) 18

Riley v California,
573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014) 1, 7, 9, 11

Sitz v Dep't of State Police,
443 Mich 744; 506 NW2d 209 (1993) 16

State v Carter,
322 NC 709; 370 SE2d 553 (1988) 19

State v Lussier,
171 Vt 19; 757 A2d 1017 (2000) 20

State v Cline,
617 NW2d 277 (Iowa, 2000) 19

United States v Anderson-Bagshaw,
509 F App'x 396 (CA 6, 2012) 5

United States v Cuevas-Sanchez,
821 F2d 248 (CA 5, 1987) 10

United States v Dunn,
480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987) 4

United States v Ganias,
824 F3d 199 (CA 2, 2016) 1

United States v Janis,
428 US 433; 96 S Ct 3021; 49 L Ed 2d 1046 (1976) 14

United States v Jones,
565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012) 1, 6, 11

United States v Katzin,
769 F3d 163 (CA 3, 2014) 1

United States v Leon,
468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984) 16

United States v Moore-Bush,
36 F4th 320 (CA 1, 2022) 13

United States v United States Dist Ct,
407 US 297; 92 S Ct 2125; 32 L Ed 752 (1972) 15

Williams v Manning,
unpublished opinion of the Superior Court of Delaware, issued March 13, 2009 (Case No. 05C-11-209-JOH), 2009 WL 960670 13

Williams v Williams,
8 Ohio Misc 156; 221 NE2d 622 (Com Pl, 1966) 20

Wolfson v Lewis,
924 F Supp 1413 (ED Pa, 1996) 12

Other Authorities

Adams, Dronesfy, *Top 3 Best Drones Under $300 for Beginners: Ultimate Buyer's Guide* (August 13, 2023) 7

Andrés, Jeramie & Stanley, American Civil Liberties Union, Electronic Frontier Foundation & Electronic Privacy Information Center,
Privacy Considerations for BVLOS Drones (March 31, 2023) 8

Dwyer, *Police Video Caught a Couple's Intimate Moment on a Manhattan Rooftop*,
New York Times (December 22, 2005) 5

Federal Aviation Administration, *Airplane Flying Handbook* (2021) 6

Federal Aviation Administration, *Become a Pilot* (December 5, 2022) 6

Federal Aviation Administration, *DOT and FAA Finalize Rules for Small Unmanned Aircraft Systems* (June 21, 2016) 8

Hennigan, *It's a Bird! It's a Spy! It's Both*, Los Angeles Times (February 17, 2011) 8

Indigo Vision, Consolidated Security Merchants, *Need Something More Specialized?* 7

Long Lake Township Nuisance Ordinance No 155, § 5 18

Stanley, American Civil Liberties Union, *Eye-in-the-Sky Policing Needs Strict Limits* (July 27, 2023) 8, 9

Sullivan, *Scientists Are Making Drones From Taxidermy Birds*, Smithsonian (April 25, 2023) 8

QUESTIONS PRESENTED

1. Did the appellee violate the appellants' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellants' property for use in zoning and nuisance enforcement?

   The Court of Appeals answered: Yes.

   Amici's Answer: Yes.

2. Does the exclusionary rule apply to this dispute?

   The Court of Appeals answered: No.

   Amici's Answer: Yes.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization. The ACLU of Michigan is a state affiliate of the ACLU. Both organizations are dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws and, for decades, have been at the forefront of efforts nationwide to protect the full array of civil rights and liberties, including the right to the protections enshrined in the Fourth Amendment. The ACLU, ACLU of Michigan, and their attorneys have frequently appeared before courts (including this one) throughout the country in Fourth Amendment cases, both as direct counsel and as amici curiae. See *Carpenter v United States*, 585 US __; 138 S Ct 2206; 201 L Ed 2d 507 (2018) (warrantless acquisition of cellphone location information); *ACLU v Clapper*, 785 F3d 787 (CA 2, 2015) (bulk collection of call records), *United States v Katzin*, 769 F3d 163 (CA 3, 2014) (warrantless GPS tracking), *Alasaad v Nielsen*, 419 F Supp 3d 142, 147 (D Mass, 2019) (warrantless searches of electronic devices at the border), *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (cellphone searches incident to arrest), *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012) (warrantless GPS tracking), *United States v Ganias*, 824 F3d 199 (CA 2, 2016) (en banc) (storing hard-drive data not responsive to a warrant for years); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017) (warrantless "knock and talk"); *Johnson v VanderKooi*, 502 Mich 751; 918 NW2d 785 (2018) (warrantless fingerprinting); *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020) (scope of warrant for search of cell phone);

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

Leaders of a Beautiful Struggle v Baltimore Police Dep't, 2 F4th 330 (CA 4, 2021) (en banc) (mass aerial surveillance over Baltimore).

The Mackinac Center for Public Policy ("Mackinac Center") is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. The Mackinac Center have an interest in this case because they are committed to maintaining a strong and historically rooted Fourth Amendment that protects individual liberty and limits government overreach.

INTRODUCTION

No one, anywhere, reasonably expects that their local government will deploy investigative cameras in the sky to repeatedly record their behavior on their own private property. Yet that is what happened in this case—and if the Township gets its way, it will not only profit from its privacy violations, but open the door to other local governments deploying cheap, pervasive, flying surveillance devices to surveil private property for the smallest of civil infractions. This Court should ensure that this is not the future in which Michiganders are consigned to live.

Drones can cheaply provide a bird's-eye view of everything occurring below, and their capabilities are rapidly expanding. As their cameras become more powerful and their flight times get longer, they offer the government an increasingly clear picture of people's most private spaces. If the Fourth Amendment is to retain its value, such sophisticated, intrusive technologies must be deployed only with judicial authorization. Otherwise, any government actor—from a zoning board to a mayor, or a curious policeman on the beat to a school board president—could investigate any type of concern by flying drones over the place of interest, without any regard for the constitutional interests of the people on the ground.

In this case, the Township hired and directed a drone operator to gather evidence that Appellants were in violation of a zoning ordinance and a prior settlement agreement. Three times, the drone flew over Appellants' home and surrounding property and captured photographs of it. This warrantless surveillance violated the Fourth Amendment. Further, the unconstitutionally obtained photographs should be suppressed. While the exclusionary rule most often applies in criminal proceedings, both this Court and the United States Supreme Court have applied the rule in certain types of civil proceedings. A robust exclusionary rule is necessary to deter future unconstitutional searches, and ensure that Michiganders enjoy constitutional rights in practice, not

just in theory. Here, applying the exclusionary rule is the only way to ensure that local government employees all over the State are restrained from filling the Michigan skies with drones looking for even the most minor offenses without judicial assurance that their surveillance comports with the Constitution.

ARGUMENT

I. Repeated and Targeted Low-Altitude Aerial Surveillance of Curtilage Interferes with the Fourth Amendment Right to Be Secure in Our Homes Against Unreasonable Searches.

The home stands at the "very core" of the Fourth Amendment's protections. *Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (citation omitted). And the same protection extends to the home's curtilage, which "harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" *United States v Dunn*, 480 US 294, 300; 107 S Ct 1134; 94 L Ed 2d 326 (1987), quoting *Boyd v United States,* 116 US 616, 630; 6 S Ct 524; 29 L Ed 746 (1886); see *Collins v Virginia*, 138 S Ct 1663, 1671; 201 L Ed 2d 9 (2018). Curtilage is therefore "part of the home itself for Fourth Amendment purposes." *Jardines*, 569 US at 6, quoting *Oliver v United States,* 466 US 170, 180; 104 S Ct 1735; 80 L Ed 2d 214 (1984); accord *People v Frederick*, 500 Mich 228, 234; 895 NW2d 541 (2017). Were curtilage left unprotected, the constitutional sanctity of the entire home would be in serious jeopardy. "The right to retreat into one's home and be free from governmental intrusion 'would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity.'" *People v Tafoya*, 494 P3d 613, 619 (Colo, 2021) (cleaned up), quoting *Jardines*, 569 US at 6. Indeed, "there exist no 'semiprivate areas' within the curtilage where governmental agents

may roam from edge to edge." *Bovat v Vermont*, 141 S Ct 22, 24; 208 L Ed 2d 240 (2020) (Gorsuch, J., respecting the denial of certiorari) (discussing *Jardines*).

Using modern digital cameras to conduct targeted surveillance of a person's home and its surroundings can reveal a great deal of private, often intimate activity. That is no surprise, because where people reasonably believe they are not just *in their home*, but *at home*, they relax, and behave in ways that they are neither intending to nor expecting to expose to the public. For example, in one case involving surveillance with a small camera installed on a utility pole overlooking the defendant's property, the camera "captured [the defendant's] husband naked and her son relieving himself against a tree." *United States v Anderson-Bagshaw*, 509 F App'x 396, 401 (CA 6, 2012). In another incident, a police helicopter captured video of a couple having sex on their private penthouse terrace. See Dwyer, *Police Video Caught a Couple's Intimate Moment on a Manhattan Rooftop*, New York Times (December 22, 2005) <https://www.nytimes.com/2005/12/22/nyregion/police-video-caught-a-couples-intimate-moment-on-a-manhattan.html> (accessed September 6, 2023). Repeated aerial surveillance above a private residence can allow the State to learn a great deal of private facts, including "who is in the home, and with whom the residents of the home meet, when, and for how long." *Commonwealth v Mora*, 485 Mass 360, 371–372; 150 NE3d 297, 309 (Mass, 2020).[2]

[2] Amici take no position on the fact-bound question whether *all* of the area captured by the drone flights at issue was curtilage. Compare Appellants' Br 20–21 with Appellee's Br 24–29. It is clear, however, that at least some of the area surrounding the home was curtilage, to which the full measure of Fourth Amendment protection applies. This case is therefore unlike cases like *Dow Chemical Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986), and *Oliver*, 466 US at 170, which involved inspection of open fields only.

II. Drones Supercharge the Capabilities and Availability of Aerial Surveillance, and Their Investigative Use By Government Actors Requires Courts to Engage in a Fresh Application of Fourth Amendment Protections.

Drones are a novel technology that renders what was formerly impossible—or at best difficult, expensive, and obvious—easy, cheap, and hard to detect. As the U.S. Supreme Court has repeatedly warned, without robust application of Fourth Amendment safeguards, such technologies threaten to undermine the "degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter v United States*, 138 S Ct 2206, 2214; 201 L Ed 2d 507 (2018), quoting *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001). As the Court explained, surveillance tools with the capacity to "effortlessly compile[]" highly "detailed" information, *Carpenter*, 138 S Ct at 2216, in ways that grant the government "access to a category of information [that was] otherwise unknowable," *id.* at 2218, require application of the Fourth Amendment's protections.

The Township argues that cases from the 1980s involving short, fleeting overflights by traditional piloted aircraft decide this case. See Appellees' Supp Br 31–33. But when it comes to aerial surveillance, drones simply change the game. The threat to Americans' privacy posed by government use of piloted aircraft has always been cabined by the practical constraints of traditional aerial surveillance, because flying planes or helicopters to engage in surveillance was (as Justice Alito observed of long-term location tracking) "difficult and costly and therefore rarely undertaken." *United States v Jones*, 565 US 400, 429; 132 S Ct 945; 181 L Ed 2d 911 (2012) (Alito, J., concurring in the judgment). It also required advanced training and expertise.[3] But drone

[3] See generally Federal Aviation Administration, *Become a Pilot* (December 5, 2022) <https://www.faa.gov/pilots/become>; Federal Aviation Administration, *Airplane Flying Handbook* (2021) <https://www.faa.gov/sites/faa.gov/files/regulations_policies/handbooks_manuals/aviation/airplane_handbook/00_afh_full.pdf>.

technology effectively removes those checks, opening the door to "a too permeating police surveillance." *Carpenter*, 138 S Ct at 2214 (citation and quotation marks omitted). Never before could the government deploy, at its convenience, an inexpensive and unobtrusive floating camera, controlled from afar, to record scenes from above a person's private property. Now, though, digital-age technology has rendered aerial surveillance "remarkably easy, cheap, and efficient"—as well as indiscernible—"compared to traditional investigative tools." *Id.* at 2217–2218. Unmistakably, drones offer government agencies both large (like the Federal Bureau of Investigation) and small (like Long Lake Township's code enforcers) a significant "enhancement of what" people have "reasonably . . . expect[ed]" government investigators could do. *Mora*, 485 Mass at 374 (cleaned up) (citation omitted).

Indeed, in the context of aerial surveillance, comparing airplanes and helicopters to drones is like equating the search of a wallet to that of a cell phone—or, in Chief Justice Roberts's more colorful terms, comparing a "ride on horseback" to a "flight to the moon." *Riley v California*, 573 US 373, 393; 134 S Ct 2473; 189 L Ed 2d 430 (2014). Already, inexpensive, small, off-the-shelf drones are capable of lengthy flights and are equipped with cameras capable of capturing immense detail. See, e.g., Adams, Dronesfy, *Top 3 Best Drones Under $300 for Beginners: Ultimate Buyer's Guide* <https://dronesfy.com/top-best-drones-under-300-guide/> (posted August 13, 2023) (accessed September 6, 2023) (describing drones capable of flying up to 25 minutes on a single battery as far as a mile away with ultra-high-definition cameras); see also Appellants' Supp Br 6. The technology is rapidly developing, and soon the capabilities of today's drones will seem downright quaint.[4] No wonder that the number of police departments across the country with

[4] See, e.g., Indigo Vision, Consolidated Security Merchants, *Need Something More Specialized?* <http://web.archive.org/web/20190415230615/https://csmerchants.com.au/pages/indigovision-specialized-cameras> (accessed September 6, 2023) (describing an ultra-high-resolution camera

drones in their surveillance arsenals has reached 1,400—and counting. Stanley, American Civil Liberties Union, *Eye-in-the-Sky Policing Needs Strict Limits* (July 27, 2023), p 1 <https://www.aclu.org/documents/eye-in-the-sky-policing-needs-strict-limits>.

Drones will not only keep getting smaller, cheaper, and more capable, but one of the major constraints on pervasive drone deployment by local governments—regulatory limits—will likely be relaxed soon. To date, the Federal Aviation Administration ("FAA") has generally kept a lid on pervasive drone use across our communities by prohibiting drone flights "beyond visual line of sight," or "BVLOS." Federal Aviation Administration, *DOT and FAA Finalize Rules for Small Unmanned Aircraft Systems* (June 21, 2016) <https://www.faa.gov/newsroom/dot-and-faa-finalize-rules-small-unmanned-aircraft-systems> (accessed September 6, 2023). But that is likely to dramatically change. The FAA is engaged in a revolutionary rulemaking aimed at allowing by-right BVLOS flights for anyone who meets certain criteria. See generally Andrés, Jeramie & Stanley, American Civil Liberties Union, Electronic Frontier Foundation & Electronic Privacy Information Center, *Privacy Considerations for BVLOS Drones* (March 31, 2023) <https://www.aclu.org/documents/privacy-considerations-bvlos-drones> (accessed September 6, 2023). That development is likely to "greatly increase the overall number of drones operating over

---

capable of capturing thousands of megapixels— "so much detail [that] you can pick out a face amongst a crowd of thousands"); Hennigan, *It's a Bird! It's a Spy! It's Both*, Los Angeles Times (February 17, 2011) <https://www.latimes.com/archives/la-xpm-2011-feb-17-la-fi-hummingbird-drone-20110217-story.html> (describing a "pocket-sized drone" developed by a defense contractor more than a decade ago that would be akin to a "mini-spy plane capable of maneuvering on the battlefield and in urban areas"); Sullivan, *Scientists Are Making Drones From Taxidermy Birds*, Smithsonian (April 25, 2023) <https://www.smithsonianmag.com/smart-news/scientists-are-making-drones-from-taxidermy-birds-180982042> (article discussing researchers who designed drones using pieces of taxidermy birds, so that the drones look and move like real birds); see also Appellants' Supp Br 29 n 8.

our communities," including those operated by government agencies at every level. *Eye-in-the-Sky*, p 2.

In deciding this case, this Court should heed what is coming. As the U.S. Supreme Court has made clear, courts must consider related, existing technologies that could further enhance the government's surveillance capabilities. See *Kyllo*, 533 US at 34, 36. Any rule a court adopts in a case involving even "relatively crude" surveillance technology, *id.* at 36, "'must take account of more sophisticated systems that are already in use or in development,'" *Carpenter*, 138 S Ct at 2218, quoting *Kyllo*, 533 US at 36, rather than "leave the [public] at the mercy of advancing technology," *Kyllo*, 533 US at 35.

Similarly, in "confronting new concerns wrought by" new, digital-age surveillance technologies like drones, this Court should be "careful not to uncritically extend existing precedents." *Carpenter*, 138 S Ct at 2222, citing *Riley*, 573 US at 386. The U.S. Supreme Court has approved of isolated uses of aerial surveillance in three cases dating back more than thirty years, though each involved aerial observations with—by today's standards—unsophisticated equipment or no equipment at all. But as the Court of Appeals previously explained in its vacated opinion in this case, these cases cannot "control whether surveillance by more advanced drone technology at lower altitudes is a search." Appellants' Supp Br 26, citing 2021 slip op at 8, App'x 0031. The first of those cases, *California v Ciraolo*, 476 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986), involved a one-time, "simple visual observation[]" of curtilage from 1,000 feet with "the naked eye." *Id.* at 214–215. The next, *Dow Chemical Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 226 (1986)—decided the same day as *Ciraolo*—concluded that the Fourth Amendment was not triggered by the aerial observation of an industrial area akin to an "open field" through a flyover technique the Court called "conventional" and "commonly used," without

employing any "highly sophisticated surveillance equipment not generally available to the public." *Id.* at 231, 238. And the last, *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989), permitted a helicopter flyover for naked-eye observations in a routinely used, publicly accessible airway. *Id.* at 450.

As courts have appreciated for decades, "[i]t does not follow that" these cases "authorize[] any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible," *United States v Cuevas-Sanchez*, 821 F2d 248, 251 (CA 5, 1987), and they can hardly be taken as endorsing, for decades hence, the warrantless use of intrusive advanced technologies to target and surveil people or private property in ways that go far beyond the capabilities of a casual observer. See also Appellants' Supp Br 27 (citing state appellate court rulings concluding that helicopter surveillance triggered a Fourth Amendment search notwithstanding the U.S. Supreme Court's precedent). Here, drones' small size, ability to fly at lower altitudes while nonetheless escaping immediate detection, incredible camera technology, and ability to be deployed serially for repeated, inexpensive surveillance flights significantly change the Fourth Amendment calculus.[5]

Further, the 1980s cases, at bottom, rested on the view that when people expose private things to the public, an expectation of privacy was not reasonable. For example, in the flyover cases, the Court repeatedly referred to the fact that the general public could lawfully be present in

[5] See 2021 slip op at 9, App'x 0032 ("A drone is therefore necessarily more intrusive into a person's private space than would be an airplane overflight. Furthermore, unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally targeted surveillance, drone overflights are not as commonplace, as inadvertent, or as costly. In other words, drones are intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy. Also, given their maneuverability, speed, and stealth, drones are—like thermal imaging devices—capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind."); see also Appellants' Supp Br 27–28.

aircraft flying in navigable airspace above private property. See *Ciraolo*, 476 US at 213–214; *Riley*, 488 US at 451. But the notion that potential public exposure always defeats a reasonable expectation of privacy has never been a hard-and-fast rule. See *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) ("[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). In recent years, the Supreme Court has made quite clear that "[a] person does not surrender all Fourth Amendment protection [even] by venturing into the public sphere." *Carpenter*, 138 S Ct at 2217.

For example, it is now beyond dispute that people's long-term physical movements, even in public places, enjoy constitutional protection against technological surveillance. Almost a decade ago, a majority of the U.S. Supreme Court adopted that view, and the Court subsequently affirmed it as the law of the land. See *Carpenter*, 138 S Ct at 2217 (citing concurring opinions of five Justices in *Jones*, 565 US 400). That protection exists because the recording of individual movements over time reveals our "privacies of life," *id.*, quoting *Riley*, 573 US at 403, quoting *Boyd*, 116 US at 630, laying bare "not only . . . particular movements, but through them . . . 'familial, political, professional, religious, and sexual associations,'" *id.*, quoting *Jones*, 565 US at 415 (Sotomayor, J., concurring). Long-term location tracking made possible through advanced technology intrudes upon the reasonable expectation that the government "would not—and indeed, in the main, simply could not—secretly monitor and catalogue [a person's] every single movement . . . for a very long period." *Id.*, citing *Jones*, 565 US at 430 (Alito, J., concurring in the judgment); see *Leaders of a Beautiful Struggle v Baltimore Police Dep't*, 2 F4th 330, 341 (CA 4, 2021) (en banc) ("Thus, *Carpenter* solidified the line between short-term tracking of public movements—akin to what law enforcement could do prior to the digital age—and prolonged tracking that can reveal intimate details through habits and patterns." (cleaned up)).

Both the Supreme Court, in *Carpenter*, and the en banc Fourth Circuit, in *Leaders of a Beautiful Struggle*, have dismissed the argument that because some people could see some of a person's movements on public streets, expecting any measure of privacy over those movements was unreasonable. For the same reason, this Court should reject the notion that simply because a passerby *could* lawfully observe a person's private property—from a private plane flying overhead, or by a hobbyist's toy drone zipping around from a nearby park—that person has surrendered a reasonable expectation of privacy over that property entirely. The U.S. Supreme Court's recent privacy cases make clear that the government engages in a Fourth Amendment search when it uses new technologies that can amass information revealing our "privacies of life," *Carpenter*, 128 S Ct at 2217 (citation omitted), even if isolated details might have been observable prior to the digital age. When the government utilizes a new, invasive digital-age tool to target and repeatedly surveil a person's private property in a way that was unthinkable in decades past, it has conducted a Fourth Amendment search.[6]

Finally, that people have a reasonable expectation that they will not be subject to repeated drone surveillance on their own property finds support in the availability of tort claims for harassment and privacy invasions. If a private individual repeatedly flew a surveillance drone over another person's curtilage, that person might reasonably sue them for tortious behavior. Cf. *Wolfson v Lewis*, 924 F Supp 1413, 1420 (ED Pa, 1996) ("Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion."); *Jackman v Cebrink-Swartz*, 334 So 3d 653, 654 (Fla App, 2021) (repeated instances

[6] The use of drones by the government for different purposes might raise different, and sometimes difficult, legal questions under the Fourth Amendment. But the Township's repeated and targeted low-altitude surveillance in this case does not raise those types of questions.

of neighbor filming woman in home from over privacy fence sufficient to support judgment against neighbor for invasion of privacy); *Williams v Manning*, unpublished opinion of the Superior Court of Delaware, issued March 13, 2009 (Case No. 05C-11-209-JOH), 2009 WL 960670, at *17–18 (punitive damages for privacy and nuisance claims based on neighbor's installation of cameras directed at other neighbor's home); *Goosen v Walker*, 714 So 2d 1149, 1150 (Fla App, 1998) (videotaping neighbors in their yard or adjoining area on two to four occasions supported a finding of stalking). These examples only underscore individuals' expectation of privacy against flying cameras spying on their homes. Cf. *United States v Moore-Bush*, 36 F4th 320, 335, 337 n 16 (CA 1, 2022) (Barron, C.J., concurring) (citing privacy torts as evidence of reasonable expectation of privacy against longer-term government video surveillance of curtilage).

III. The Township's Repeated and Targeted Low-Altitude Aerial Surveillance of Appellants' Home Without a Warrant Violated the Fourth Amendment.

The question in this case is whether Long Lake Township's three drone flights over Appellants' property to collect evidence to use against them in a zoning proceeding violated Appellants' reasonable expectations of privacy. As the Court of Appeals previously held, they did. See 2021 slip op at 8–10, App'x 0031–0033. The Township's drone flew over and captured images of Appellants' curtilage—deliberately, repeatedly, and to gather evidence. See 2021 slip op at 4, App'x 0027. It did so without a warrant, and no exception to the warrant requirement even arguably applies. See Appellants' Supp Br 35–36. As a result, the Township engaged in an unconstitutional search of Appellants' property.

IV. This Court Should Apply the Exclusionary Rule in this Context to Deter Municipalities from Violating Michiganders' Fourth Amendment Rights.

As a general matter, "[t]he introduction into evidence of materials seized and observations made during an unlawful search is prohibited by the exclusionary rule." *People v Stevens*, 460

Mich 626, 633; 597 NW2d 53 (1999). Neither the U.S. Supreme Court nor this Court has had occasion to determine whether the exclusionary rule applies in civil zoning and nuisance proceedings. But both courts have recognized that there are civil contexts in which the exclusionary rule does apply. See *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 702; 85 S Ct 1246; 14 L Ed 2d 170 (1965) (holding exclusionary rule applies in civil forfeiture proceedings); *In re Jenkins*, 437 Mich 15, 28; 465 NW2d 317 (1991) ("Michigan's exclusionary rule has in certain cases been applied to civil proceedings").

When determining whether the exclusionary rule applies in any given context, courts consider a number of factors. See, e.g., *One 1958 Plymouth Sedan*, 380 US at 700 (considering a proceeding's quasi-criminal character); *United States v Janis*, 428 US 433, 458; 96 S Ct 3021; 49 L Ed 2d 1046 (1976) (considering whether the proceeding in which the unconstitutionally obtained evidence would be used falls within the government actor's "zone of primary interest"); *Pennsylvania Bd of Prob & Parole v Scott*, 524 US 357, 368; 118 S Ct 2014; 141 L Ed 2d 344 (1998) (considering a proceeding's administrative, supervisory nature); *Kivela v Dep't of Treasury*, 449 Mich 220, 236–239; 536 NW2d 498 (1995) (using a five-factor balancing test borrowed from the Sixth Circuit). As Appellants explain, none of the factors courts have examined in connection with this question cautions against its application here. See Appellants' Supp Br 44–54. Applying the exclusionary rule in this context is entirely consistent with federal and state precedent, and it is critical to deterring government misconduct and preserving the privacy rights of Michiganders.

A. The exclusionary rule's deterrence function is especially important where the state deploys increasingly powerful modern surveillance technologies.

As technological developments make it easier and cheaper to intrude upon people's homes and the most intimate aspects of people's lives, the exclusionary rule becomes all the more necessary to deter unconstitutional use of surveillance technologies. Here, any societal costs to

excluding the aerial photographs must yield to the crucial need to deter future warrantless drone surveillance by countless units of government at all levels.

"In determining whether exclusion is proper, a court must 'evaluate the circumstances of this case in the light of the policy served by the exclusionary rule.'" *Stevens*, 460 Mich at 635, quoting *Brown v Illinois,* 422 US 590, 604; 95 S Ct 2254; 45 L Ed 2d 416 (1975). One of the exclusionary rule's primary functions is to deter unconstitutional searches and seizures by preventing the state from benefiting from illegally obtained evidence. See *People v Warner*, 401 Mich 186, 209; 258 NW2d 385 (1977). The exclusionary rule serves to "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Stevens*, 460 Mich at 635, quoting *Brown*, 422 US at 599–600.

For the Fourth Amendment to retain its value, such robust protection must encompass application of the exclusionary rule in order to incentivize government actors to comply with constitutional principles when deploying novel or unexpected surveillance tools. Most importantly, "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v United States Dist Ct*, 407 US 297, 318; 92 S Ct 2125; 32 L Ed 752 (1972). But here, Long Lake Township employees decided not to obtain judicial approval before hiring a private contractor to fly a drone over the Maxons' property three times and capture their activities below. Unless this Court suppresses the aerial photographs, the Township and all other local government entities will have a green light to commission unsupervised drone surveillance in violation of Michiganders' Fourth Amendment rights.

In past decades, the cost and difficulty of repeatedly photographing Defendants' curtilage—particularly the portions set back from the street and not visible from public rights of way, see Appellants' Supp Br. 14–15—would have prevented the Township from conducting such

intrusive aerial surveillance without a warrant. See earlier Section II. Today, the exclusionary rule is the only effective way to incentivize the Township to enact and follow proper procedures for the deployment of novel surveillance practices. Indeed, "[t]he key to the [exclusionary] rule's effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits." *United States v Leon*, 468 US 897, 919 n 20; 104 S Ct 3405; 82 L Ed 2d 677 (1984). That deterrence function applies with equal or perhaps even greater force to civil officials who are not regularly trained and educated about constitutional limitations on police authority and private citizens' rights. The Township must be incentivized to train its employees on Fourth Amendment requirements and enact systems to ensure government surveillance operations comply with the federal and state constitutions.

B. Michigan's Constitution and precedent favor applying the exclusionary rule here.

The exclusionary rule is longstanding in Michigan. More than a century ago, in 1919, this Court became "one of the first courts in the country to apply the federal exclusionary rule to exclude unlawfully seized evidence" in state courts, "forty-two years before it was mandated by federal law." *Sitz v Dep't of State Police*, 443 Mich 744, 756 n 7, 776; 506 NW2d 209 (1993), citing *People v Marxhausen*, 204 Mich 559, 575; 171 NW 557 (1919). That proactive protection of rights stemmed from "this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'" *People v Tanner*, 496 Mich 199, 221–223; 853 NW2d 653 (2014). "Simply put, [the Court's] exercise of judgment concerning the reasonable meaning of the provisions of our state Constitution cannot, consistently with our oath of office and our structure of constitutional

federalism, be delegated to another judicial body"—even to the justices in Washington, D.C. *Id.* at 222 n 16.

Indeed, this Court recently vacated a portion of a Court of Appeals opinion that had stated the United States and Michigan constitutions were "coextensive." *People v Katzman*, 505 Mich 1053; 942 NW2d 36 (2020). In doing so, the Court reaffirmed that the Michigan Constitution may provide greater protections than the Fourth Amendment where there is "compelling reason to impose a different interpretation." *Id.*, quoting *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). Here, both the Michigan Constitution and the Fourth Amendment protect individuals from repeated, low-altitude drone surveillance over their curtilage. But even if a federal court were to reject application of the exclusionary rule in this context, there would still be compelling reasons to honor Michigan's historical commitment to robust application of constitutional protections—and to hold that the exclusionary rule applies in these civil proceedings.

First, this Court has previously applied the exclusionary rule in civil cases involving severe intrusions upon a defendant's privacy. For example, in a civil action for damages based on an alleged negligent killing, this Court held that it was error not to suppress evidence derived from a blood extraction taken while the defendant was unconscious. See *Lebel v Swincicki*, 354 Mich 427, 441; 93 NW2d 281 (1958). After canvassing criminal cases that raised "[a]nalogous questions," the Court determined that "under a Constitutional provision worded as is Article 2, § 10, of the Constitution of Michigan, the taking of blood for purposes of analysis from the person of one who is unconscious at the time constitutes a violation of his rights, and that testimony based on the analysis of such blood should not be admitted in evidence" in the civil proceeding. *Id.* at 440; see also *McNitt v Citco Drilling Co*, 397 Mich 384, 388; 245 NW2d 18 (1976) (holding nonconsensual

blood alcohol tests could not be used in civil litigation where they were conducted pursuant to a statute that authorized such tests, with consent, for use in specified types of criminal prosecution).

Here, the aerial photographs should be suppressed because, as in *Lebel*, the government intrusion occurred without judicial authorization, and the defendant "knew nothing about and at no time gave consent" to the specific intrusion. *Lebel*, 354 Mich at 435. In the same way that a nonconsensual blood draw is equally invasive whether its results are used in criminal or civil proceedings, a drone repeatedly surveilling a couple's home violates the same fundamental rights whether the results are used against homeowners in a criminal prosecution or a civil zoning action. And the consequences of violating Long Lake Township's zoning ordinance, like the consequences of a criminal conviction, can include steep fines—here, up to $500 per day that the ordinance was violated. Long Lake Township Nuisance Ordinance No 155, § 5, p 3 <https://longlaketwpmi.documents-on-demand.com/document/d697aecb-c9a6-ec11-a36e-000c29a59557/Nuisance%20Ordinance%20/#_%20155.PDF>.[7]

Second, this Court has recognized that the exclusionary rule serves not only to deter unconstitutional state action, but also to protect the right to privacy and preserve judicial integrity. See *Warner*, 401 Mich at 209 ("The exclusionary rule has a dual purpose: (1) protection of the right to privacy, and (2) deterrence of police misconduct."); *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664, 675 (2008) ("Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity."); *Kivela*, 449

[7] In *Kivela*, this Court declined to apply the rule in a civil jeopardy tax assessment proceeding where police searched a home with a warrant lacking in probable cause, in part because that search did not involve the same "degree of intrusiveness" as removing blood from living people. *Kivela*, 449 Mich at 236. But here, as discussed above in Section II, the surveillance was highly intrusive, warrantless, and qualitatively different from less technologically advanced visual observation.

Mich at 237–238 ("The exclusionary rule is designed to protect defendants from illegal searches and seizures, and to deter police officers from violating a person's Fourth Amendment rights.").

This Court should apply the exclusionary rule here to assure Michiganders that they retain the right to be secure in their homes, and that their courts will not look the other way when the government disregards constitutional requirements. "By admitting evidence obtained illegally, courts . . . in essence condone the illegality by stating it does not matter how the evidence was secured." *State v Cline*, 617 NW2d 277, 289 (Iowa, 2000); see also *State v Gutierrez*, 116 NM 431, 447; 863 P2d 1052 (1993) ("admission of improperly seized evidence denigrates the integrity of the judiciary—judges become accomplices to unconstitutional executive conduct"); *State v Carter*, 322 NC 709, 719–723; 370 SE2d 553 (1988) ("Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government . . . The courts cannot condone or participate in the protection of those who violate the constitutional rights of others"). This Court should reaffirm that the People of Michigan enjoy the right to be free from remotely operated surveillance machines flying over their properties by applying the exclusionary rule here.

C. This Court would be in good company if it applied the exclusionary rule to these civil proceedings.

While some state courts have rejected the exclusionary rule in civil contexts, many have applied it. See, e.g., Appellants' Supp Br 43, 52 n 19. For example, the Georgia Supreme Court applied the exclusionary rule in public nuisance actions because the mandate in *Mapp* "was not for criminal cases only." *Carson v State ex rel Price*, 221 Ga 299, 303; 144 SE2d 384 (1965). The court reasoned that this was "clear from the Mapp decision and from the more recent pronouncement in One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693." *Id.* And the Ohio Court of Common Pleas has noted that the *Mapp* decision itself "is very broad

and does not seemingly make a distinction between a civil and criminal case." *Williams v Williams*, 8 Ohio Misc 156, 161; 221 NE2d 622 (Com Pl, 1966).

In *State v Lussier*, the Supreme Court of Vermont held that the exclusionary rule applied to civil license suspension proceedings. *State v Lussier*, 171 Vt 19, 31; 757 A2d 1017 (2000). While the court "recognize[d] the importance of removing intoxicated drivers from Vermont's highways," it held that "the public's interest in having strict police control over persons driving on our highways may not be satisfied at the expense of our constitutional right to be free from unbridled government interference in our lives." *Id.* at 31–32. The court determined "the exclusionary rule is just as necessary to deter unlawful police conduct in the context of civil suspension proceedings as it is in related criminal DWI proceedings." *Id.* Otherwise, "law enforcement officers could make investigatory stops based on hunches or stereotypical beliefs, or for any or no reason whatsoever, knowing that even if any evidence obtained from the stop were to be suppressed in criminal proceedings, license suspensions could still follow." *Id.* at 32. In other words, "allowing unlawfully obtained evidence to be admitted in civil suspension proceedings could encourage disregard for the constitutional limits of a legal stop." *Id.* at 32–33.

Similarly, New York's high court has applied the exclusionary rule in proceedings initiated by the State Liquor Authority to suspend or cancel liquor licenses and forfeit bonds. *Finn's Liquor Shop, Inc v State Liquor Auth*, 24 NY2d 647; 249 NE 2d 440; 301 NYS 2d 584 (1969). Recognizing that "[s]tate agencies, charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions . . . within the confines of the Fourth Amendment," *id.* at 654, the court determined that when agents "exceed those limits, [the agency] should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose constitutional rights have

been violated," *id.* at 655. The court reasoned that "[t]he logic of the *Mapp* rule, which requires the exclusion of such evidence in order to deter State officials from engaging in unlawful searches and seizures, applies equally whether the evidence is sought to be used in a criminal trial or on an administrative hearing." *Id.* at 662. And "[t]here can be no justification for any State agency, charged with enforcement of the law, to rely, in fulfilling its function, upon the unlawful and unconstitutional acts of its agents." *Id.* at 662–663. Otherwise, if "the State, or its agents, c[ould] bypass the deterrent effect of the exclusionary rule by using the fruits of an illegal search in a 'civil' or 'administrative' proceeding, [then] the incentive for enforcement and investigative personnel to exceed constitutional limitations on their activity remains and the effectiveness of the rule as a deterrent is diminished." *Id.* at 653.

The Township here is constrained by the Fourth Amendment, and should not be able to benefit from evidence it has obtained unconstitutionally. The exclusionary rule's deterrence purpose is logically served where state actors violated the Fourth Amendment and have every incentive to continue doing so unless this Court intervenes.

CONCLUSION

For the above reasons, amici respectfully urge this Court to hold that warrantless, repeated drone surveillance of Appellants' home violated the Fourth Amendment, and that the evidence obtained therefrom must be suppressed under the exclusionary rule.

Dated: September 8, 2023

Respectfully submitted,

/s/ Daniel S. Korobkin

Daniel S. Korobkin (P72842)
Philip Mayor (P81691)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201

(313) 578-6824
dkorobkin@aclumich.org

Brett Max Kaufman
Nathan Freed Wessler
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2603
bkaufman@aclu.org

Patrick J. Wright (P54052)
Mackinac Center for Public Policy
140 West Main Street P.O. Box 568
Midland, MI 48640
(986) 631-0900
wright@mackinac.org

Counsel for Amici Curiae

WORD COUNT STATEMENT

This brief contains 5,765 words in the sections covered by MCR 7.212(C)(6)-(8).

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)